

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TRISHA E. DAVIS)	
Claimant)	
V.)	
)	
RESIDENCE INN MARRIOTT)	
Respondent)	Docket No. 1,073,918
AND)	
)	
TRAVELERS PROPERTY CASUALTY COMPANY)	
OF AMERICA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the August 17, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. R. Todd King of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 11, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges she fell down stairs at work on April 23, 2015, and injured her back, neck and right knee. She also alleges that two days later, on April 25, she twisted her right knee while assisting hotel guests.

The ALJ determined claimant's right knee injury arose out of and in the course of her employment, but her neck and back injuries did not. The ALJ noted claimant was receiving Social Security disability benefits because of significant preexisting back and neck conditions and Dr. Murati did not conclude claimant's accident was the prevailing factor causing her alleged back and neck injuries.

Respondent appeals and requests the Board find claimant did not suffer a right knee injury arising out of and in the course of her employment because claimant's

contemporaneous medical records do not support her allegation of a work injury on April 23, 2015. Respondent also asserts claimant's April 23 accidental injury was the result of a neutral risk or idiopathic cause. With regard to claimant's April 25 accident, respondent contends the accident was the result of a neutral or personal risk, there was no causal connection between her work conditions and her accident and her injury was the result of a normal activity of day-to-day living.

Claimant did not file a brief to the Board. The only issue is: did claimant sustain a right knee injury by accident on April 23 and 25, 2015, arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant worked as a front desk agent at one of respondent's hotels. Claimant testified that on April 23, 2015, she worked the night shift and was delivering receipts to the rooms of hotel guests. Claimant indicated that while descending the stairs between the third and second floors, she stumbled and fell, injuring her neck, back and right knee. Claimant was not aware of any issues with the stairs, such as a loose step. Nor did she have shoe issues. After falling, claimant went downstairs and elevated her leg. She notified her supervisor, Sean Mermis, of the incident. When claimant got home, she put ice on her leg. Claimant did not seek medical attention that day or the next. She self-medicated with pain medication she previously was prescribed.

On Saturday, April 25, 2015, claimant worked the day shift. She was sending an email and fax for two guests at the front desk and was going into the office. When she turned to the right to go into a doorway, her right knee popped. She did not know if the floor was wet, she slipped, or if there was anything she tripped over. At the time, claimant was carrying five sheets of paper. Claimant indicated her right knee, neck and back hurt since April 23. Claimant indicated she reported injuring her right knee on April 25 to Matthew McMurtry and also told him about falling down the stairs on April 23. On May 12, 2015, claimant gave respondent a note, dated the same date, indicating she injured her back, legs, knee and neck. The note stated, "I stumbled falling downstairs Wednesday 3rd shift while delivering guests receipts, and on Saturday 1st shift I stumbled, twisted my knee which popped also; going into the office to fax and email for guests. Sunday I went to the ER."¹

On April 26, 2015, claimant went to the emergency room at Wesley Medical Center/Galichia Heart Hospital (Wesley). Wesley records from that visit indicate claimant complained of twisting and popping of her knee at work the day before. X-rays revealed no acute osseous abnormality, small joint effusion and mild narrowing of the medial joint space that could be due to early degenerative changes.

¹ P.H. Trans., Cl. Ex. 1.

Rita N. Simpson, P.A., at Advanced Pain Medicine Associates saw claimant for low back and bilateral leg pain on April 27, 2015. Ms. Simpson's notes from that visit state: "Recent right knee sprain work-icing."² Ms. Simpson previously saw claimant in January and February 2015 for chronic neck and back pain.

Claimant sought treatment for her right knee at Wesley on May 13, 2015. Claimant reported right knee pain due to falling down stairs and landing on her knee at work on April 23, 2015, and then experiencing a pop on April 25. The record indicates claimant was diagnosed with pain and swelling of the right knee.

On May 14, 2015, claimant went to NovaCare Rehabilitation for physical therapy for her right knee. Claimant was already undergoing physical therapy at NovaCare for her neck and back. She reported injuring her right knee on April 23, 2015, falling down stairs and on April 25, 2015, when it popped while turning right into an office.

Melissa Nix, general manager of the hotel where claimant worked, testified claimant worked audit shifts from 11 p.m. to 7 a.m. two days a week and two daytime shifts from 7 a.m. to 3 p.m. or 3 p.m. to 11 p.m. She indicated that she was unaware prior to May 12, 2015, that claimant was asserting a workers compensation claim. Prior to that date, she had conversations with claimant, including a performance evaluation on May 9, but claimant never mentioned a work accident. On May 13 or 14, 2015, Ms. Nix received a note from Mr. Mermis indicating claimant had a work injury.

The ALJ allowed into evidence transcripts of interviews by an insurance adjustor with Mr. Mermis on an unknown date and Mr. McMurtry on May 19, 2015. Mr. Mermis indicated it was on May 12, 2015, that he first was informed by claimant that she was alleging an April 23, 2015, accident. Prior to then, claimant had never complained to him of back pain, knee pain or aches and pains. Mr. Mermis indicated claimant mentioned having been in a car accident years earlier that gave her pain every so often, causing her to sit down at times.

Mr. McMurtry, a co-worker of claimant, told the adjustor he first learned of claimant's April 23 work injury during the week prior to his interview. Mr. McMurtry indicated that in the previous few weeks, claimant did not indicate she was in pain and he did not observe claimant in pain.

At the request of her counsel, claimant was evaluated by Dr. Pedro A. Murati on July 14, 2015. The doctor did not have any radiological films for review. The history claimant gave to Dr. Murati concerning her April 23 and 25 accidental injuries was consistent with her testimony. Dr. Murati diagnosed claimant's right knee condition as right patellofemoral syndrome and recommended cortisone injections, a knee brace or taping

² P.H. Trans., Resp. Ex. 8.

and anti-inflammatory and pain medications as needed. The doctor opined claimant's accident at work was the prevailing factor causing the development of her right knee condition.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁴

K.S.A. 2014 Supp. 44-508(f)(2), in part, states:

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

This Board Member finds claimant suffered a right knee injury by accident arising out of and in the course of her employment with respondent. At first glance, April 26, 2015, Wesley emergency room notes, claimant's May 12, 2015, note to respondent and the statements of Mr. Mermis and Mr. McMurtry appear to controvert claimant's testimony that

³ K.S.A. 2014 Supp. 44-501b(c).

⁴ K.S.A. 2014 Supp. 44-508(h).

she fell down stairs on April 23. However, a closer examination of that evidence is not convincing.

On April 26, claimant reported to Wesley that she sustained a knee injury at work the day before. On May 13, she told Wesley about her April 23 work injury and experiencing a pop on April 25. She also reported her April 23 and 25 accidental injuries to NovaCare on May 14 and to Dr. Murati.

Claimant testified her accidents occurred on April 23 and 25, 2015. There is little in the record to dispute claimant's description of how and when her accidents occurred. Apparently, the ALJ found claimant's testimony credible because he found her accidents were the prevailing factor causing her right knee injury.

In her May 12 note to respondent, claimant indicated her accidents occurred on Wednesday and Saturday and that she went to the emergency room on Sunday, but did not specify the dates of those events. April 23 is a Thursday. Claimant's shift would have been from 11 p.m. on April 22 to 7 a.m. on April 23. April 25 is a Saturday. This Board Member is convinced claimant's note merely misstated Wednesday and does not diminish her credibility.

Claimant testified she reported her April 23 accident to Mr. Mermis and her April 23 and 25 accidents to Mr. McMurtry. Those gentlemen indicated they first learned of her accidents on or around May 12, 2015. Even if the statements of Mr. Mermis and Mr. McMurtry concerning notice are correct, they do not controvert claimant's testimony that she injured her right knee on April 23 and 25.

Respondent asserts claimant's April 23 accident was the result of an idiopathic cause. This Board Member finds little merit in that argument. "Doctors use the term idiopathic to refer to something for which the cause is unknown."⁵ The cause of claimant's April 23 accident is known: she stumbled and fell. Nor did the accident arise out of a neutral risk. Claimant was walking down the stairs in order to complete a work task.

Respondent contends claimant's April 25 accident was the result of a neutral or personal risk, there was no causal connection between her work conditions and her accident and her injury was the result of a normal activity of day-to-day living. In its brief, respondent stated it "struggles to identify the nexus between walking on a flat, smooth surface and turning to the right, and any nature, obligation, condition, or incident of her employment as a desk clerk at a hotel."⁶

⁵ *Kuxhausen v. Tillman Partners*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008), *aff'd* 291 Kan. 314, 241 P.3d 75 (2010).

⁶ Respondent's Brief at 15.

In *Smalley*,⁷ the Kansas Court of Appeals noted:

The phrase “arising out of or in the course of employment” does not include injuries from a risk personal to the worker. K.S.A. 2014 Supp. 44-508(f)(3)(A)(iii). Where an employment injury is clearly attributable to a personal condition of the employee and no other factors intervene or operate to cause or contribute to the injury, that injury is not compensable.

This Board Member likens this case to *Fiene*.⁸ Ms. Fiene walked to her car to retrieve some work books from a state vehicle when she discovered the car was locked. As she turned around to go back to her house to get the keys, her right foot got stuck and she fell. The Board Member deciding *Fiene* stated, in part:

Both claimant’s accident and injury were not the result of the normal activities of day-to-day living, a neutral risk with no particular employment or personal character, a personal risk or an idiopathic cause. Rather, she was hurt because her foot was stuck on the blacktop when she was carrying out her job duties.

When claimant turned into the office, she was performing her job duties by assisting two hotel guests with a fax and email. Respondent’s arguments ignore the basic fact that claimant suffered an accidental injury while performing a work duty. When claimant turned to go into the office, she was not engaged in a personal risk. There was a causal connection between walking and turning to complete her work task and her right knee injury. Sending faxes or emails for hotel guests is not a normal activity of day-to-day living.

In summary, this Board Member, like the ALJ, is convinced claimant sustained a right knee injury by accident on April 23 and 25, 2015, arising out of and in the course of her employment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

⁷ *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015).

⁸ *Fiene v. State of Kansas*, No. 1,065,475, 2014 WL 3886819 (Kan. WCAB July 7, 2014).

⁹ K.S.A. 2014 Supp. 44-534a.

¹⁰ K.S.A. 2014 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member affirms the August 17, 2015, preliminary hearing Order entered by ALJ Jones.

IT IS SO ORDERED.

Dated this ____ day of November, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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